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Pension Fund, et al.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BAY AREA PAINTERS AND TAPERS
PENSION FUND, et al.,

Plaintiffs,

v.

RHODES PAINTING AND DECORATING, INC.
aka RHODES PAINTING, a California
Corporation, and

LANETT FERGUSON, an individual,

Defendants.

Case No. C12-6162-MMC

~~[PROPOSED]~~

**FIRST AMENDED JUDGMENT
PURSUANT TO STIPULATION;**

~~[PROPOSED]~~ **ORDER THEREON**

THIS SERVES TO AMEND the Judgment Pursuant to Stipulation (Dkt. #29) entered on November 26, 2013 in favor of Plaintiffs Bay Area Painters and Tapers Pension Fund, et al. (collectively “Plaintiffs” or “Trust Funds”) and against Defendant Rhodes Painting and Decorating, Inc. *aka* Rhodes Painting, a California corporation (“Rhodes Painting”), Defendant Lanett Ferguson, and/or alter egos and/or successor entities (collectively “Defendants”).

Defendants have requested that the Judgment Pursuant to Stipulation be amended to include additional amounts owed to Plaintiffs. This document shall, upon execution by all parties, supersede the previous stipulation, and become the operative document between the parties.

1 IT IS HEREBY STIPULATED and AGREED (the “First Amended Stipulation” or “First
2 Amended Judgment”) by and between the parties hereto, that a First Amended Judgment shall be
3 entered in the within action in favor of Plaintiffs, as follows:

4 1. Defendants are signatory to and bound by the terms of a Collective Bargaining
5 Agreement(s) (“Bargaining Agreement”) with the Plaintiff Union (“Union”). The Bargaining Agreement
6 is still in full force and effect.

7 2. Defendant Lanett Ferguson, in her capacity as RMO of Defendant Rhodes Painting,
8 hereby acknowledges that she is authorized to receive service on behalf of Defendant Rhodes Painting,
9 and has received all relevant documentation in this action, including but not limited to the Summons and
10 Complaint. Defendant Lanett Ferguson confirms that she is authorized to enter into this First Amended
11 Stipulation on behalf of Defendant Rhodes Painting and confirms that she is personally guaranteeing the
12 amounts due herein. Defendants specifically consent to the Court’s jurisdiction, as well as the use of a
13 Magistrate Judge for all proceedings, including entry of judgment herein. Defendants further confirm
14 that all successors in interest, assignees, and affiliated entities (including, but not limited to, parent or
15 other controlling companies), and any companies with which Defendant Rhodes Painting joins or
16 merges, if any, shall also be bound by the terms of this First Amended Stipulation as Guarantors. This
17 shall include any additional entities in which Defendant Lanett Ferguson is an officer, owner or
18 possesses any controlling ownership interest. All such entities shall specifically consent to the Court’s
19 jurisdiction, the use of a Magistrate Judge for all proceedings, and all other terms herein, in writing, at
20 the time of any assignment, affiliation or purchase.

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3. Defendants are currently indebted to the Trust Funds as follows:

JUDGMENT PURSUANT TO STIPULATION		
Conditional Judgment Balance as of 4/5/16:	\$12,058.39	
5% interest on Conditional Judgment Balance (4/6/16-4/22/16):	\$16.50	
20% Liquidated Damages on 10/09-12/12 Audit (\$4,595.33); 12/12,1/13, 3/13-9/13 Late-Paid Contributions (\$6,834.58) <i>Conditionally Waived:</i>	\$11,429.91	
Subtotal:		\$23,482.07
LIQUIDATED DAMAGES & INTEREST ON LATE-PAID "CURRENT" CONTRIBUTIONS		
20% Liquidated Damages on Late-Paid 4/14 (\$2,147.01); 7/14 (\$1,792.83); 4/15 (\$164.70); and 9/15 (\$150.00) Contributions:	\$4,252.54	
5% Interest on Late-Paid 4/14 (\$6.82); 7/14 (\$22.60); 4/15 (\$12.24); and 9/15 (\$1.46) Contributions:	\$43.12	
Subtotal:		\$4,295.66
ADDITIONAL ATTORNEYS' FEES AND COSTS		
Attorneys' Fees (10/31/13-4/15/16):	\$19,022.00	
Costs (10/31/13-2/29/16):	\$85.58	
Subtotal fees and costs:		\$19,107.58
FIRST AMENDED JUDGMENT TOTAL:		\$46,885.31

REQUIREMENTS UNDER THE TERMS OF THIS STIPULATION

4. Notice requirements pursuant to the terms of this Stipulation are as follows:

- a) **Notices to Defendants:** Lanett Ferguson, Rhodes Painting and Decorating, Inc., 230 Granada Avenue, San Francisco, CA 94112; email: rhodespainting@msn.com
- b) **Notices to Plaintiffs:** Michele R. Stafford, Saltzman & Johnson Law Corp., 44 Montgomery Street, #2110, San Francisco, CA 94104; email: mstafford@sjlawcorp.com, copy to compliance@sjlawcorp.com (subject line: "Rhodes Painting")

5. The requirements pursuant to the terms of this First Amended Stipulation are as follows:

- a) **Monthly Payments:** Defendants shall conditionally pay the amount of \$31,200.86, representing all of the above amounts, less liquidated damages in the amount of \$15,684.45.
 - i) Payments in the amount of **\$1,375 per month** shall begin on June 30, 2016, and continue on or before the last business day of each month thereafter **for a period of twenty-four (24) months**. *Defendants are required to pay electronically by wire transfer, or by cashier's check.*
 - ii) Defendants shall have the right to increase the monthly payments at any time and there is no penalty for prepayment.
 - iii) Payments shall be applied first to interest, at the rate of 5% per annum in

accordance with the Bargaining Agreement(s) and Trust Agreements. Interest shall begin to accrue on April 6, 2016.

b) **Contributions:** Beginning with contributions due for hours worked by Defendants' employees during the month of March 2016, and for every month thereafter until this Judgment is satisfied, Defendants shall remain current in reporting and payment of contributions due to Plaintiffs under the terms of the Collective Bargaining Agreement(s). *Contributions must be paid by joint check.*

c) **Job Reports:** Beginning with the month of April 2016, and for every month thereafter, Defendants shall fully disclose all jobs on which it is working by providing Plaintiffs with fully completed job reports on the form attached hereto as Exhibit A.

d) **Joint Check Agreements:** *Prior to commencing work on a new job, Defendants shall execute Joint Check Agreements. To allow time for preparation and execution of said agreements, Defendants shall notify Plaintiffs of new jobs in writing at least fourteen (14) days prior to commencing work on a new job, by providing Plaintiffs with a supplemental Job Report form on the form attached hereto as Exhibit A. Defendants shall execute proposed Joint Check Agreement(s) and return same to Plaintiffs within three (3) days of receipt.*

e) **Certified Payroll Reports:** *Beginning with the month of May 2016, Defendants shall provide Plaintiffs with copies of all Certified Payroll Reports ("CPR")for all jobs worked by the 7th day of the month following the month in which the hours were worked (i.e. CPR for all hours worked during May 2016 shall submitted by June 7, 2016).*

f) **Audit:** Should the Trust Funds request an audit of Defendants' payroll records pursuant to the requirements of the Bargaining Agreement(s) and/or Trust Agreements, Defendants must contact the auditor within seven (7) days of receiving notice, and must schedule the audit as requested. In the event that amounts are found due to Plaintiffs as a result of the audit, Plaintiffs shall send a copy of the audit report, and written demand for payment to Defendants. In the event that the audit findings are not contested, payment in full shall be delivered to Michele R. Stafford at the address provided above.

i) In the event that Defendants dispute the audit findings, Defendants must

provide the dispute in writing, with all supporting documentation within ten (10) days of the date of the demand. Defendants shall be notified as to whether revisions will be made to the audit. If revisions are not made, payment will be immediately due. If revisions are made, payment in full of the revised amount shall be immediately due.

ii) If Defendants are unable to make payment in full, Defendants may submit a request to add the amounts found due to this Stipulation. If the Stipulation is so revised, Defendants shall execute an amended judgment within ten (10) days of receipt. Failure to execute the amended judgment shall constitute a default of the terms herein.

iii) Failure by Defendants to submit either payment in full or a request to add the amounts due to this Judgment within ten days of receipt shall constitute a default of the obligations under this agreement. All amounts found due on audit shall immediately become part of this First Amended Judgment.

g) **Fees:** Defendants shall pay all additional attorneys' fees and costs incurred through Satisfaction of Judgment, whether or not a default occurs.

6. In summary, Defendants shall deliver the following payments and documents to Plaintiffs at the following locations on or before the following delivery deadlines until this First Amended Stipulation has been fully satisfied:

Required Submissions	Delivery deadlines ¹	Delivery locations
Stipulated payments in the amount of \$1,375.00 payable to <i>District Council 16 Northern California Trust Funds</i>	Last business day of each month (6/30/16-5/31/18)	Michele R. Stafford Saltzman & Johnson Law Corp. 44 Montgomery Street, #2110 San Francisco, CA 94104
Current contribution reports and payments payable to <i>District Council 16 Northern California Trust Funds</i>	Last business day of each month (beginning 4/30/16, for 3/16 hours)	Michele R. Stafford Saltzman & Johnson Law Corp. 44 Montgomery Street, #2110 San Francisco, CA 94104 Plus copies to: compliance@sjlawcorp.com (subject: "Rhodes Painting")

¹ If the First Amended Stipulation has not been fully satisfied by 5/31/18, all monthly submission requirements shall continue until all amounts have been paid and a Satisfaction of Judgment has been filed with the Court.

Required Submissions	Delivery deadlines ¹	Delivery locations
		<u>and</u> District Council 16 Northern California Trust Funds P.O. Box 4816 Hayward, CA 94540-4816
Completed job reports (form attached as Exhibit A to Stipulation)	Last business day of each month (beginning 4/30/16, for 4/16 hours)	Michele R. Stafford Saltzman & Johnson Law Corp. 44 Montgomery Street, #2110 San Francisco, CA 94104 or compliance@sjlawcorp.com (subject: "Rhodes Painting")
Supplemental job reports for new jobs (form attached as Exhibit A to Stipulation)	Within 14 days of commencing work on a new job	Michele R. Stafford Saltzman & Johnson Law Corp. 44 Montgomery Street, #2110 San Francisco, CA 94104 or compliance@sjlawcorp.com (subject: "Rhodes Painting")
Certified payroll reports	7 th day of each month (beginning 6/7/16, for 5/16 hours)	Michele R. Stafford Saltzman & Johnson Law Corp. 44 Montgomery Street, #2110 San Francisco, CA 94104 or compliance@sjlawcorp.com (subject: "Rhodes Painting")
Joint check agreements	Within 3 days of receipt of proposed agreement <u>and</u> prior to commencing work on a new job	Michele R. Stafford Saltzman & Johnson Law Corp. 44 Montgomery Street, #2110 San Francisco, CA 94104 or compliance@sjlawcorp.com (subject: "Rhodes Painting")

7. Failure to comply with any of the above terms, including submitting a payment that does not clear the bank, shall constitute a default of the obligations under this First Amended Stipulation.

DEFAULTS UNDER THE TERMS OF THIS STIPULATION

8. If default occurs, Plaintiffs shall make a written demand to Defendants to cure said default *within seven (7) days of the date of the notice from Plaintiffs*. In the event default is not cured

1 within the required time frame, all amounts remaining due hereunder (after application of principal
2 payments made, if any) shall be due and payable on demand by Plaintiffs. These amounts shall include
3 any conditionally waived liquidated damages, additional contributions/liquidated damages/interest, and
4 additional attorneys' fees and costs incurred herein.

5 9. Any unpaid or late-paid contributions, together with 20% liquidated damages and 5% per
6 annum interest, shall become part of this Judgment. Plaintiffs reserve all rights available to collect any
7 contributions and related amounts not included herein. This includes, but is not limited to, any amounts
8 due pursuant to employee timecards or paystubs, by audit, or other means. Should Defendants fail to
9 submit a report for any month, contributions shall be estimated pursuant to Trust Fund policy.
10 Defendants specifically waive the defense of the doctrine *res judicata* as to any such additional amounts
11 determined as due.

12 10. A Writ of Execution may be obtained without further notice, in the amount of the unpaid
13 balance plus any additional amounts due under the terms herein, if Defendants fail to cure a default
14 within seven (7) days of the date of notice from Plaintiffs. Such Writ of Execution may be obtained
15 solely upon declaration by a duly authorized representative of Plaintiffs setting forth the balance due as
16 of the date of default.

17 **MISCELLANEOUS PROVISIONS**

18 11. The above requirements remain in full force and effect regardless of whether or not
19 Defendants have ongoing work, whether Defendants' account with the Trust Funds is active, or whether
20 Defendants are signatory to a Collective Bargaining Agreement with the Union. If, for any reason,
21 Defendants have no work to report during a given month, Defendants shall submit the job report form
22 (Exhibit A attached hereto) indicating that there are no current jobs. If Defendants have no contributions
23 to report, Defendant shall submit the applicable contribution report stating "no employees."

24 12. Payments made by joint check shall be endorsed on behalf of Defendants prior to
25 submission, and may be applied toward Defendants' monthly stipulated payment, provided that the
26 issuer of the joint check is not requesting a release in exchange for the payment. Joint checks for which a
27 release is requested may not be applied toward Defendants' monthly stipulated payment, but shall be
28 deducted from the total balance owed under this First Amended Stipulation, provided the payment is for

1 contributions included in this First Amended Stipulation.

2 13. Prior to the last payment pursuant to this First Amended Stipulation, Plaintiffs shall
3 advise Defendants as to the final amount due, including additional interest, any current contributions and
4 related amounts, and all additional attorneys' fees and costs incurred by Plaintiffs, whether or not
5 Defendants defaults herein. Any additional amounts due shall be paid in full with the final stipulated
6 payment due on May 31, 2018.

7 14. The conditional waiver of liquidated damages shall be presented to the Board of Trustees
8 for consideration only after all amounts due under the terms of this First Amended Stipulation are paid
9 in full, and Defendants' account is otherwise current. If Defendants have fully complied with the terms
10 of the First Amended Stipulation without default(s), the waiver shall be granted. If the waiver is granted,
11 a Satisfaction of Judgment will be filed with the Court once all payments have cleared the bank. If the
12 waiver is not granted, the liquidated damages will be immediately due.

13 15. Defendants waive any notice of Entry of Judgment or of any Request for a Writ of
14 Execution, and expressly waive all rights to stay of execution and appeal.

15 16. Any failure on the part of Plaintiffs to take any action as provided herein in the event of
16 any breach of the provisions of this First Amended Stipulation shall not be deemed a waiver of any
17 subsequent breach.

18 17. The parties agree that any payments made pursuant to the terms of this Judgment shall be
19 deemed to have been made in the ordinary course of business as provided under 11 U.S.C. Section
20 547©(2) and shall not be claimed by Defendants as a preference under 11 U.S.C. Section 547 or
21 otherwise.

22 18. Should any provisions of this First Amended Stipulation be declared or determined by
23 any court of competent jurisdiction to be illegal, invalid, or unenforceable, the legality, validity, and
24 enforceability of the remaining parts, terms or provisions shall not be affected thereby and said illegal,
25 unenforceable or invalid part, term, or provisions shall be deemed not to be part of this First Amended
26 Stipulation.

27 19. This First Amended Stipulation is limited to the agreement between the parties with
28 respect to the unpaid and delinquent contributions and related sums enumerated herein, owed by

Defendants to Plaintiffs. This First Amended Stipulation does not in any manner relate to withdrawal liability claims, if any. Defendants acknowledge that Plaintiffs expressly reserve their right to pursue withdrawal liability claims, if any, against Defendants and all of its control group members, as provided by Plaintiffs' Plan documents, Trust Agreements incorporated into their Bargaining Agreements, and applicable laws and regulations.

20. This First Amended Stipulation contains all of the terms agreed to by the parties and no other agreements have been made. Any changes to this First Amended Stipulation shall be effective only if made in writing and signed by all parties hereto.

21. This First Amended Stipulation may be executed in any number of counterparts and by facsimile, each of which shall be deemed an original and all of which shall constitute the same instrument.

22. Defendants represent and warrant that they have had the opportunity to be or have been represented by counsel of their own choosing in connection with entering this First Amended Stipulation under the terms and conditions set forth herein, that they have read this First Amended Stipulation with care and are fully aware of and represent that they enter into this First Amended Stipulation voluntarily and without duress.

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23. The parties agree that the Court shall retain jurisdiction of this matter until this Judgment is satisfied.

DATED: April 25, 2016

**RHODES PAINTING AND DECORATING,
INC., a California Corporation**

By: /S/
Lanett Ferguson
RMO of Defendant Rhodes Painting, Inc.

DATED: April 25, 2016

LANETT FERGUSON

By: /S/
Lanett Ferguson, Individually

DATED: May 2, 2016

**SALTZMAN & JOHNSON LAW
CORPORATION**

By: /S/
Michele R. Stafford
Attorneys for Plaintiffs

DATED: April 28, 2016

**BAY AREA PAINTERS AND TAPERS
PENSION TRUST FUND, et al.**

By: /S/
Vince Echeverria
Trustee of Plaintiff Trust Funds

DATED: April 26, 2016

**BAY AREA PAINTERS AND TAPERS
PENSION TRUST FUND, et al.**

By: /S/
Marian Bourboulis
Trustee of Plaintiff Trust Funds

IT IS SO ORDERED.

IT IS FURTHER ORDERED ~~that the calendar in this matter is vacated, and~~ that the Court shall retain jurisdiction over this matter.

DATED: May 6, 2016


UNITED STATES DISTRICT JUDGE

Exhibit A: JOB REPORT FORM**Completed Forms Due by the Last Business Day of each month**by email to compliance@sjlawcorp.com (subject line: *Rhodes Painting*) or
delivered to Saltzman & Johnson, 44 Montgomery St., Ste. 2110, San Francisco, CA 94104**Employer: RHODES PAINTING AND DECORATING, INC.****Report for the month of _____, 20__ Submitted by: _____**

Project Name:		Public or Private? (Circle one)
Project Address:		
General Contractor:		
General Contractor Address:		
General Contractor Phone #:	Project Manager Name:	
Project Manager Phone #:	Project Manager email address:	
Contract #:	Contract Date:	
Total Contract Value:		
Work Start Date:	Work Completion Date:	
Project Bond #:	Surety:	
Joint Check Agreement Executed?	Yes Not yet – please prepare (Circle one)	

Project Name:		Public or Private? (Circle one)
Project Address:		
General Contractor:		
General Contractor Address:		
General Contractor Phone #:	Project Manager Name:	
Project Manager Phone #:	Project Manager email address:	
Contract #:	Contract Date:	
Total Contract Value:		
Work Start Date:	Work Completion Date:	
Project Bond #:	Surety:	
Joint Check Agreement Executed?	Yes Not yet – please prepare (Circle one)	

Attach additional sheets as necessary